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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-950

EDWARD J. BARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 505 F. 2d 1091.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1974. A petition for rehearing (Pet. App. B) was denied on January 2, 1975. The petition for a writ of certiorari was filed on February 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial because of allegedly improper or illegal inducements made by the prosecution to a government witness.

2. Whether the government's evidence proved commission of mail fraud by petitioner.

3. Whether the cumulative effect of several alleged trial errors denied petitioner a fair trial.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged petitioner with six counts of causing travel by persons in interstate commerce pursuant to a bribery scheme, in violation of 18 U.S.C. 1952 (counts 1–6), four counts of attempting to evade income taxes by failing to report the bribes he received that were the subject of counts 1–6, in violation of 26 U.S.C. 7201 (counts 7–10), and six counts of causing the use of the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 (counts 11–16). The mail fraud counts were subsequently dismissed and replaced with a superseding indictment charging the same offenses. That indictment was consolidated with the first ten counts of the original indictment for trial. Following a jury trial, petitioner was convicted on all counts and sentenced to concurrent three-year terms of imprisonment on each count, pursuant to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2), and fined $15,000. The court of appeals affirmed, one judge dissenting (Pet. App. A).

The evidence at trial is reviewed at length in the opinion of the court of appeals (Pet. App. A2–A11).

1. While serving as County Clerk of Cook County, Illinois, from 1955 until the time of his conviction in this case, petitioner was charged with the responsi-

bility of purchasing and insuring voting machines for the County. In 1954, the State's Attorney of Cook County rendered an opinion that competitive bidding was not required in the purchase of voting machines, because the machines the County already had were purchased from the Shoup Voting Machine Corporation, and no other company sold comparable machines. The opinion further advised that bids for voting machine purchases could only be requested from Shoup, but that any bid required the approval of the County Clerk and the County Board (Pet. App. A2–A3). The president of the County Board testified that from 1967 to 1971 voting machine contracts submitted to the Board by the County Clerk were approved without debate in reliance upon the judgment of the County Clerk (Pet. App. A3).

In December 1965, petitioner met in his office with Irving H. Meyers, who was then a 10 percent owner and the president of Shoup Voting Machine Corporation. Meyers testified that at that meeting an agreement was reached whereby petitioner would be personally paid $200 for each voting machine purchased by the County, half the money to be paid when Shoup received a "firm" contract for the machines and the other half to be paid when Shoup received payment for the machines from Cook County. It was agreed that a portion of the cost of such illegal "kickbacks" would be absorbed by increasing the price of the voting machines by $100 over their past price (Pet. App. A3–A4).

At a meeting in January 1967, petitioner told Meyers that he thought there would be money in the

budget for voting machines and that Meyers should send him a proposal for 300 machines. On January 13, 1967, Meyers sent petitioner a proposal for the sale of 300 voting machines at $1,898 each, an increase of $107 over the previous bid submitted to the County. However, petitioner informed Meyers that the County did not have funds to buy the machines (Pet. App. A5).

In October 1967, at petitioner's request, Meyers submitted another proposal for 300 machines at $1,890 each, $99 above the last bid accepted by the County in 1965. The bid was approved by petitioner and unanimously accepted by the County Board, and on November 14, 1967, Meyers flew to Chicago and delivered $30,000 in cash to petitioner at an airport restaurant (*ibid.*). Shoup Corporation received the last payment on the machines in early August, 1968, and on August 9, 1968, Meyers delivered another $30,000 in cash to petitioner at the same restaurant (Pet. App. A6).

Following similar procedures for other purchases of voting machines, petitioner received additional "kickbacks" of $15,000 on August 20, 1968, $45,000 on February 13, 1969, $30,000 on March 23, 1970, and $30,000 on August 30, 1970, for a total of $180,000 (Pet. App. A7–A9).[1] Meyers' testimony relating to these events was corroborated by telephone records, used airline tickets or records of travel agencies, and records of the opening of a safe deposit box maintained by

[1] The delivery of the money to petitioner on August 20, 1968, was made by one Tony Lemisch at Meyers' direction. On all other occasions, Meyers took flights from Philadelphia to Chicago, where he personally delivered the cash to petitioner at the Chicago airport (Pet. App. A5–A9).

Meyers, in which he kept cash to make the payoffs (Pet. App. A6–A9).

2. The purchase of insurance on the voting machines owned by Cook County was the responsibility of petitioner in his *ex officio* role as Comptroller of Cook County. During the period from 1967 through 1971, the voting machine insurance was placed by the Deputy Comptroller, C. R. Hodgman, with Arthur J. Gallagher and Company, an insurance agency. Premiums were paid by the County directly to the insurance carrier, which in turn paid a 25 percent commission to the Gallagher company. The Gallagher firm retained a 10 percent commission, and paid the remaining 15 percent to petitioner, who never reported to the County Board that he was receiving the commissions (Pet. App. A10). Although Edward Keating, vice president of Arthur J. Gallagher, testified that the County received the best possible price on the insurance, he admitted that the choice of carriers was limited to those insurance companies with which the Gallagher firm had an agency agreement. Further, Keating testified that at the direction of Deputy Comptroller Hodgman, the Gallagher firm was not identified on the insurance policies, contrary to customary procedure (*ibid.*). Petitioner, in addition to being County Clerk, was an insurance broker who received commissions on other business, and during the period 1968 through 1970, approximately one-third of the income he received in commissions was on the voting machine insurance (*ibid.*).

The mail fraud counts on which petitioner was convicted involved the mailing of checks by Cook County

to the insurance companies, and the mailing of checks by the insurance companies to the Gallagher firm (*ibid.*).

ARGUMENT

1. Petitioner contends that he was denied a fair trial because the government made illegal, or at least improper, inducements to Meyers, the chief government witness on the counts relating to the purchase of the voting machines, in order to obtain Meyers' testimony incriminating petitioner. Petitioner's claim relates to a plea agreement entered into between the government and Meyers concerning charges brought against Meyers in the Eastern District of Pennsylvania in 1972.

Meyers and several co-defendants were indicted on charges of mail fraud, conspiracy, use of the mails to carry out a bribery scheme, and filing false income tax returns. Prior to trial, Meyers agreed to plead guilty to the charges and to cooperate with the government in future cases. In exchange for Meyers' plea and promise of cooperation, the Justice Department agreed to recommend concurrent sentences of imprisonment for a year and a day, subject to immediate parole eligibility under 18 U.S.C. 4208(a), and further agreed to grant Meyers transactional immunity to insulate him from possible state prosecutions. The Department further agreed to recommend to the Internal Revenue Service that Meyers' testimony concerning the payment of bribes, if accepted as true by the Justice Department, also be accepted cas true for purposes of computing his civil tax liability.

The portion of the plea bargain concerning civil liability was summarized in a letter from the Assistant Attorney General in charge of the Criminal Division to Meyers' counsel as follows (Meyers 3500G):

> It is our understanding that Myers' civil tax liability, including fraud penalties, if any, will be determined apart from this agreement based upon the ordinary review and examination procedures of the Internal Revenue Service, with of course all of Meyers' rights to contest and litigate his tax liability reserved to him. It is understood, however, that the Internal Revenue Service has no intention of assessing to Meyers as taxable income any money which he received and passed on to others. It will not be necessary that such others be actually charged and/or convicted of receiving such money in order to determine that Meyers did not keep it as income. It will be sufficient that Meyers testify, under oath, under circumstances which cause the government to be satisfied that the money was actually passed on to others. It is understood that the government has serious question, at this time, as to the accuracy of Meyers' income tax returns, and, to the extent that Meyers' true income is established to be in excess of his reported income, he will be subjected, as stated above, to the ordinary review and assessment by the Internal Revenue Service with the possible imposition of fraud penalties left to determination by that agency or by the courts as stated above. It is our intention to solicit the written approval of

> the Commissioner of Internal Revenue to the statements made herein concerning Meyers' possible tax liability.

A copy of this letter was provided to petitioner's counsel. See n. 4, *infra*.

Petitioner contends that the agreement relating to Meyers' civil tax liability violated 18 U.S.C. 201(h), which proscribes the giving or offering of anything of value in exchange for testimony. The court of appeals rejected this contention on the ground that compromise of civil or criminal tax liability is expressly authorized by 26 U.S.C. 7122, and therefore cannot be considered to violate 18 U.S.C. 201(h); moreover, since petitioner had been fully appraised of the terms of the agreement and was allowed to use it as a basis for impeaching cross-examination, the court concluded that he was not denied a fair trial (Pet. App. A16–A20).

In addition, it seems clear that the agreement did not confer upon Meyers any monetary benefits to which he was not otherwise entitled. The tax charges brought against Meyers related to his control of a fund of approximately $700,000. To the extent that Meyers actually controlled the fund, *i.e.*, had a right or beneficial interest in the fund, it was taxable income to him. If, however, Meyers was merely a conduit or agent for purposes of dispensing the fund to others, the money so distributed was not taxable. See, *e.g.*, 2 Mertens, *Law of Federal Income Taxation*, § 17.12 (1974 rev.); *Thrower* v. *Commissioner*, 21 T.C.M. 1540, affirmed *per curiam*, 330 F. 2d 614 (C.A. 5); cf. 26 U.S.C 651–661; *Moline Properties* v *Com-*

missioner, 319 U.S. 436. Under the plea agreement the prosecution, apparently acting on the principle that if Meyers' testimony concerning the payment of bribes was deemed credible by the prosecution it should also be accepted by the Internal Revenue Service, agreed to so recommend to the Internal Revenue Service.[2]

Petitioner concedes that a dismissal of charges or favorable recommendations as to sentencing are legitimate plea bargaining factors (Pet. 14–16), but he contends that compromise of civil liability is not (Pet. 13). This contention is not substantial. While compromise of civil liability may be assigned a more precise monetary value than immunity or sentencing recommendations, the latter, which may result in the avoidance or amelioration of incarceration or fines, will often be of greater value to recipients. See *United States* v. *Isaacs,* 347 F. Supp. 763, 767 (N.D. Ill.).

Compromises of civil liability, like grants of immunity or sentencing recommendations, do bear on a witness's credibility, and a defendant is entitled, on

[2] The court of appeals noted what it believed to be an inconsistency between the conduit doctrine and the fact that Meyers pled guilty to filing false tax returns (Pet. App. A19, n. 10). An inconsistency would exist, however, only if Meyers established that he was a conduit for the entire fund. The bribes he paid to petitioner represent only a small portion of the total fund. Presumably, Meyers' guilty plea demonstrates his uncertainty concerning his ability to establish that no portion of the fund was properly treatable as income to him, and nothing in the record of this case suggests that it has subsequently been established. Indeed, we are informed by the Internal Revenue Service that the extent of Meyers' civil liability has not been finally determined and is presently the subject of negotiations in the Philadelphia Regional Office.

cross-examination, to attempt to impeach a witness on the basis of any agreements made with the government. See, *e.g., Giglio* v. *United States,* 405 U.S. 150; *United States* v. *Cawley,* 481 F. 2d 702, 706–709 (C.A. 5); *United States* v. *Wolfson,* 437 F. 2d 862, 874–875 (C.A. 2). Moreover, even if it were assumed that compromise of civil tax liability violates 18 U.S.C. 201(h), petitioner would not be entitled to suppression of Meyers' testimony since, as indicated above, the compromise bears on Meyers' credibility and not on the admissibility of his testimony.[3] See, *e.g., Wheeler* v. *United States,* 351 F. 2d 946 (C.A. 1); *United States* v. *Goldberg,* 330 F. 2d 30, 35 (C.A. 3), certiorari denied, 377 U.S. 953; see generally IIIA Wigmore, *Evidence,* § 969 (Chadbourn rev., 1970). Petitioner was given complete access to the correspondence and other materials relating to Meyers' plea agreement,[4] and Meyers was thoroughly cross-examined concerning the agreement (see Tr. 413–485).[5]

[3] Section 201(h) is a criminal sanction. It does not contain an exclusionary rule provision, and its violation does not give petitioner standing to seek suppression of evidence or dismissal of his indictment. Cf. *Frisbie* v. *Collins,* 342 U.S. 519, 522–523.

[4] Petitioners contention that the defense was "only able to attempt to impeach based upon what it knew about the plea agreement—which was very little" (Pet. 18) is refuted by the record. At the beginning of trial, petitioner was given documents concerning the agreement (Tr. 118–119), which, together with the transcript of the Pennsylvania proceedings that petitioner already possessed (Tr. 92), enabled him to conduct a detailed cross-examination of Meyers.

[5] We also note that since petitioner received concurrent sentences of three years' imprisonment on each count, reversal of conviction on the counts to which Meyers' testimony related would affect only the amount of the fine that he must pay.

2. Petitioner contends that his receipt of money from the Arthur J. Gallagher firm, constituting over half the commission paid to that firm by the carrier to whom the County paid premiums for the insurance on its voting machines, did not constitute a "scheme to defraud" within the meaning of 18 U.S.C. 1341.

The court of appeals (Pet. App. A21–A23), relying on its prior decision in *United States* v. *George*, 477 F. 2d 508 (C.A. 7), certiorari denied, 414 U.S. 827, properly rejected petitioner's contention (Pet. 19) that no fraud occurred because the evidence established that "* * * the County would not have obtained a lower price on the insurance if a brokerage commission had not been paid." The testimony of an officer of the insurance agency through which the County's policies were placed that the County received the lowest possible price was rebutted by the fact that petitioner received a rebate of part of the commission paid by the County. As the court of appeals concluded (Pet. App. A23), the County was entitled "* * * to know that the supplier of the product or service was willing to continue the supply at a discount to which [the County] was entitled."

Petitioner's argument (Pet. 19–20) that he had no "legal duty" to obtain insurance on the voting machines is irrelevant, and his argument that the commissions he received, as a licensed insurance broker, were received by virtue of his "private and independent status * * * as an independent contractor, and not because of his official duty * * *" is incorrect (Pet. 21). Whether or not petitioner had a statutory duty

to obtain insurance, the evidence established that, during the periods in question, the authority and responsibility for obtaining insurance on the voting machines was in fact vested in petitioner in his *ex officio* role as Comptroller of Cook County (Pet. 20; Pet. App. A10).

3. Finally, petitioner, citing issues involving pretrial publicity, conduct of the trial judge, alleged improper joinder of offenses, exclusion of evidence, and the denial of a bill of particulars (Pet. 23), argues that the cumulative effect of trial errors denied him a fair trial. Each of these allegations of error was considered and rejected by a majority of the lower court panel (Pet. App. A11–A15, A24–A29), on whose opinion we rely.[6] Whether the "cumulative effect" of alleged errors deprived petitioner of a fair trial is essentially a determination to be made in the context of the record of a particular case. It presents no issue of general importance and does not warrant review by this Court.

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[6] The dissenting judge concurred with the majority concerning several issues (Pet. App. A29–A31) but concluded that "the cumulative effect of * * * several errors in the proceedings * * * was sufficiently prejudicial to require a new trial * * *" (Pet. App. A29). We note, moreover, that the dissent reached the conclusion that petitioner should be afforded a new trial only with considerable reservation (Pet. App. A42):

"As I reflect on the record in this case, I must confess to some doubt as to whether the errors warrant a new trial. For the evidence of guilt is indeed strong * * *. It is, therefore, unusually tempting to acquiesce in a decision which may well represent the just and inevitable conclusion of this matter in all events."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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